IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1266 OF 2002

Ishwara Dhondi Kamble)
Age about 69 years,)
Occupation : Labour work,)
Resident of Atit, Taluka-Satara)
Dist. Satara.)
(At present Central Prison Kalamba)..Appellant
(Org.Accused)

Versus

The State of Maharashtra)..Respondent

Shri R.V.Bansode i/by Shri Dilip Bodke for the appellant/accused.

Smt.V.R.Bhonsale APP for the State.

Coram : S.B.Mhase &
R.S.Mohite,JJ

Date : 30.03.2007.

Oral Judgment :- (Per : R.S.Mohite,J)

1. This is an appeal filed by the appellant Ishwara Dhondi Kamble (hereinafter referred to as the "accused") impugning a judgment and order passed by the Addl.Sessions Judge, Satara on 27.9.2002 in Sessions Case No.124 of 2000. By the impugned judgment and order the trial Court has convicted the accused for committing an offence under Section 302 of IPC and sentenced him to suffer RI for life and to pay a fine of Rs.1000/-, in default to suffer further RI for three months. The trial Court has given benefit of set off under Section 428 of

Cr.P.C.

2. The facts of the prosecution case were as follows :-

(a) That the accused Ishwara was an elder brother of the deceased Shankar Dhondi Kamble. They were both residing at village Atit, Taluka & District Satara. There was a division in the family property. The accused had dug a well and the deceased Shankar had got a motor sanctioned from a Government scheme. There was a dispute between the brothers relating to the use of the said motor and on account of this dispute, there used to be quarrels between the accused and the deceased Shankar.

(b) PW-8 Ganpati Ramchandra Gaikwad was an elderly person residing at village Atit. He was aged about 98 years. Being a senior person in the village, both, Ishwara and Shankar had taken his help for solving the dispute between them. Ishwara was the poorer of 2 brothers and he used to do the work of breaking the fire-wood. Shankar had retired as a wireman from PWD department and was therefore, financially better. PW-8 Ganpati Gaikwad was well aware of the dispute between the 2 brothers since he was asked to mediate by both of them. He had advised them to settle their dispute amicably but

both the brothers did not respond to his suggestion.

(c) On 19.4.2000 at about 10.00 A.M. PW-8 Ganpati Gaikwad alongwith his family members i.e. his wife and others had come to the S.T.stand as he and his family members were to proceed to Masur to attend the marriage of his grand-son. The family was sitting on the bench at the bus stand from 8.00 A.M. onwards awaiting a bus. At that time, while the family members were sitting on the bus stand, deceased had also come there and sat alongside them. He started talking with Ganpati and once again requested him to advise accused Ishwara as he was un-necessarily raising a dispute. After some time, as no bus was coming into the bus stop, PW-8 Ganpati got up and went to the cabin of the controller of the bus stop in order to persuade the controller to make some arrangement for a bus to enable the villagers to reach the place of marriage at proper time. The controller i.e. PW-7 Gautam Kirte then went towards the highway situated along side the bus stop to make an attempt to stop express S.T.buses so that the villagers could proceed to their destination. While the controller was attempting to stop the express buses on the highway, PW-8 Ganpati sat in the cabin of the controller. On the bench where he was earlier sitting, the deceased was chit-chatting with his wife. He saw Ishwara come

there and giving repeated blows on Shankar from the butt end of the axe. He got up and asked accused Ishwara as to what he was doing. When he was about to rush at him, he was stopped by his wife and daughter-in-law who told him that since the accused was in a disturbed state of mind, it was better not to go near him. PW-8 Ganpati claimed to have seen the incident of assault from the distance of about 15 to 20 feet, from the place where he was sitting in the cabin. He claims to have got up after 2 blows were given by Ishwara and then he further saw Ishwara giving 4 to 5 blows from the butt end of the axe to Shankar. He described the noise of blows as "phata phat". He saw that Shankar had fallen unconscious on the ground. He saw Ishwara leaving the spot alongwith his axe from the route where the buses exited from the S.T.stand.

(d) In the meanwhile, the controller PW-7 Gautam Kirte had managed to stop the Kolhapur-Mahabaleshwar express bus on the high way and had diverted the bus into the Atit bus stand. He also heard a commotion from the bus stand and when he went there he found the deceased lying on the ground on his left side, with bleeding on the back side portion of the skull. He carried an impression that Shankar must have sustained injury due to fall on the ground. Many persons had gathered on the spot. He heard talk

that the incident had taken place due to a house-hold quarrel. He decided to inform the incident to the police. He went to a house on western side to inform the police on phone but he could not contact the police because he was not getting a line. He again came to his office. Many persons were gathered. The injured was brought from the sunlight to the shed. Some family members had arrived at the spot. PW-7 Gautam Kirte immediately stopped the jeep on the highway and went to Borgaon police station and reported the incident to the police.

(e) PW-13 PSI Balekhan Mulani was on duty at Borgaon police station. He recorded the complaint of PW-7 Gautam Kirte (Exh.35) and consequently registered C.R.No.50/2000 for the alleged offence under Section 307 of IPC. He proceeded to the place of the incident immediately and prepared a panchanama of the spot of the offence in presence of 2 panchas. He saw blood stains scattered at the place of the incident. He collected the sample of blood stained earth and also with the cotton swab collected the blood scattered on the tiles. These samples were sealed by him.

(f) On 19.4.2000 itself, PW-10 Puva Devadiga produced an axe said to have been kept at his

residence by the accused at 5.30 P.M. This axe was attached by the Investigating officer under panchanama (Exh.24). He saw blood stains on the butt of the axe and also on some parts of its handle. On the very day, he arrested the accused at about 9.30 P.M. under a panchanama. He seized one white shirt and dhoti stained with blood from the person of the accused under the panchanama (Exh.27).

(g) The investigating officer then recorded the statements of Puva Devadiga and 5 others. On the very day, he received the clothes of the dead body which were seized under panchanama. Since the deceased had expired, he converted the offence under Section 302 of IPC. He collected inquest panchanama, post mortem notes and advance death certificate. He then handed over the investigation to PSI Ghanvat who completed the further investigation and filed a charge-sheet in the Court of the J.M.F.C. In due course, C.A. certificates were also received and they were also filed in the Court.

3. In due course the matter was committed to the Court of sessions and at the trial, the prosecution examined as many as 13 witnesses to prove its case. Amongst the witnesses examined was (PW-8) eye witness Ganpati Gaikwad, (PW-7) Complainant Gautam

Kirte, (PW-6) Dr.Umesh S.Pingale to prove the post mortem notes, spot panch, (PW-1) Rustum Amir Momin, panch on the discovery of the axe from the accused, (PW-2) Sunil S.Jadhav, (PW-3) Yeshwant Kenjale who was the 2nd panch on the discovery of axe by the accused, (PW-4) Maruti Shamrao Salunkhe who was the panch on seizure of the blood stains clothes from the person of the accused. (PW-5) Harish Dewadiga, (PW-9) Uttam Tupe and (PW-10) Puwa Dewadiga who were persons present in or around the S.T.stand. (PW-7) Gautam Kirte the son of the deceased was examined to prove the motive. (PW-12) Padmakar Ghanwat and (PW-13) Balekhan Mulani investigating officers were also examined to prove to indicate the course of the investigation.

4. From his 313 statement and the suggestions made to various witnesses, it appears that the defence of the accused was of total denial. The defence chose not to examine any witness. Taking into account all the material on record, the trial Court was pleased to convict and sentence the accused as aforesaid.

5. It is in these circumstances, the present appeal has been filed.

6. We have heard both the sides and perused the entire record. In our view, there is no substance

in the appeal and the same is required to be dismissed for the following reasons :-

(A) Firstly, we find that the evidence of PW-8 Ganpati Gaikwad is cogent, descriptive, detailed and acceptable. As stated here-in-above, he states in his evidence that he saw the accused giving 6 to 7 blows to his brother i.e. deceased Shankar. This witness Ganpati is an elderly person aged about 98 years and a senior resident of the village. It is clear that he knew both, Shankar and Ishwara as they were consulting him regarding their dispute. There is no major omission amounting to contradiction in his evidence. The only criticism is that being an elderly person aged about 98 years, he could not have seen the incident from 15 to 20 feet. This argument is based upon a statement of Ganpati elicited in his cross-examination that he was unable to state as to what was there above the pole which was at the distance of 8 to 9 feet from him. It is however, not brought on the record that what was actually above the pole. We cannot lose sight of the fact that Ganpati had known the accused and his brother for many years and it is inconceivable that he was making a mistake in identification. In fact, so far as Shankar was concerned, he had even referred to his conversation with Shankar before proceeding to the controller’s cabin. He has stated

in his evidence that he was not using spectacles. In our view, this criticism against the evidence of this witness is un-acceptable specially when the evidence indicates that the controller's cabin was at 10 to 15 feet away from the scene of the offence. It was then sought to be argued that this witness should be dis-believed because he could not identify the axe or clothes of the accused in the Court. We are not impressed by this argument. The axe used by the accused is a common implement used by villagers and merely because Ganpati could not identify the axe and the clothes of the accused in the Court, that does not mean that his entire evidence should be dis-carded on this account. On the contrary, this appears to be a honest statement given by the witness because even in ordinary course, it would be difficult for any person to identify the clothes worn by another person or the weapon actually used. The evidence of this witness then critisized on the ground that Ganpati admittedly returned back to the village in the same evening. If he was an eye witness, his normal conduct would be to then proceed to the police station. His evidence indicates that he came back and lay down on the cot and informed the police only after the police came 2 days after the incident. We are not inclined to dis-believe the evidence on the ground of his non-disclosure. Normally the disclosure would have been to his

family members but according to the prosecution they were all present at the bus stand and in fact, had seen the incident. Thereafter Shankar had to go to Masur to attend his grand-son's wedding and his evidence indicates that he and his family members went by the express bus. His evidence indicates that the relatives of the deceased had immediately come to the spot. The normal impression would be that the relatives would take care of the matter between the family. It cannot be lost sight of, that Ganpati was aged about 98 years and when he left to the bus stop he was not aware that Shankar had expired. In such circumstances, we do not find any fault in the conduct of Ganpati in not proceeding to the police station after returning back to the village.

7. In the nett result, we accept the evidence of Ganpati as reliable and once it is accepted then the conviction and the sentence must be upheld.

8. However, before parting with the judgment, we would also like to comment on the evidence of (PW-10) Puwa Dewadiga. This witness according to the prosecution was an eye witness but he turned hostile. Not-with-standing the fact that he turned hostile, there is material in the examination-in-chief of this witness to the effect

that while he was at his pan shop he heard a cry from the bus stop to the effect that "don't beat me Ishwara". This material clearly falsified the defence theory that the deceased must have fallen down and suffered the injuries. It must be stated here that the injuries found on the body of the deceased as enumerated in the post mortem notes are as follows :-

(1) CLW over (Rt) oceipital region (Rt) side about 4" x 2" x 1" one deep

(2) CLW posterior to (Rt) Ear muscle deep 6 cms x 1/2 cms.

(3) Lacerated wound over Pinna OH (LP) ear.

(4) Contusion over forehead around left eye & blackomning of left eye.

(5) CLW about (Lt) eye brow 1 cms x 0.5 cms x 0.5 cms.

Though the doctor stated that injury no.1 could be caused by a fall, he denied the suggestion of the defence that injuries 2 to 5 could be caused by his rolling after his fall. The evidence indicates that there was no bus at the bus stand and in fact, the controller had gone out of the bus stand to get the express bus. The theory of fallen down from the bus does not impress us as there was no material to support this fact.

9. The prosecution has also proved the motive through the evidence of (PW-11) Arun Kamble who was the son of the deceased as also through the evidence of (PW-8) Ganpati Gaikwad which indicates that there were quarrels between the deceased and the accused over the use of the electric motor.

10. It was sought to be contended that the offence would not be under Section 302 of IPC but would be one punishable under Section 304 of IPC. It was sought to be contended that the accused had used the blunt side of the axe which indicated that there was no intention to cause the death of his brother. We cannot accept this argument. It is not necessary that for an offence under Section 302 of IPC, there must be an intention to cause death. If there is intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death then the offence falls within clause 3rdly of Section 300. In the present case the doctor has categorically opined that injury no1 was sufficient to cause death in ordinary course. In the circumstances, even accepting that the intention of the accused was to cause bodily injury to the deceased, even then the offence would be covered by Section 300 (3rdly) of IPC. In this regard the Advocate for the appellant cited several judgments. Firstly, reliance was placed on the judgment of the

Apex Court in the case of **Pappu V/s. State of M.P. reported in (2006) 7 Supreme Court Cases 391**. But the facts of that case was different and a single blow has been given by the appellant by picking up a lathi in a course of sudden quarrel without any premeditation and without taking any advantage or acting in a cruel manner. In the circumstances, benefit of exception-4 under Section 300 of IPC was given. In the present case the facts are totally different. There was nothing to indicate sudden quarrel. Reliance was also placed on another judgment of the Division Bench of this Court in the case of **Chandrakant Wadkar V/s. State of Maharashtra reported in 2004(2) Bom.C.R.(Cri.) 490.** That was a case where one stab injury was given and division bench concluded on the facts of the case that offence would be under Section 304(1) of IPC. The present is a case of several blows given one after the another on a vital part of the body and the judgment cited is clearly distinguishable. Therefore, there is no substance in this contention.

11. In the circumstances, we find that there is sufficient material to sustain the conviction and sentence as imposed by the trial Court. There is no substance in the appeal and therefore, appeal stands dismissed.

(R.S.Mohite,J) **(S.B.Mhase,J)**